APPEAL NO. 010172

This appeal rises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 14, 2000. The hearing officer determined that the appellant (claimant) had not reached maximum medical improvement (MMI) as of September 25, 2000, pursuant to the designated doctor's amended report; that since MMI had not been reached the issue of an impairment rating (IR) is not ripe for adjudication; and that the claimant has had disability from November 4, 1999, through the date of the CCH.

The respondent (carrier) appeals asserting that the designated doctor's first report certifying MMI with a 0% IR is correct and the treating doctor's opinion should not "overturn the opinions of 3 orthopedic doctors . . . . " The claimant responds urging affirmance.

DECISION

Affirmed.

The claimant was employed as a furniture mover. Although the claimant had some back problems in the past, the parties stipulated that the claimant sustained a compensable low back injury on _____, while moving a piano. The hearing officer gives a good recitation of the medical evidence which will not be repeated here. After seeing several doctors for his injury, the claimant began treating with Dr. T in September 1999. Dr. T prescribed physical therapy and a series of three epidural steroid injections (ESI) to be followed by work hardening. Dr. T referred the claimant to Dr. S for the ESI's in October 1999. However before any of those procedures were performed the claimant was examined by Dr. L, the carrier's required medical examination doctor, who in a report dated November 4, 1999, certified MMI on that date with a 0% IR. There is conflicting evidence whether Dr. T agreed with that assessment (a progress note of December 15, 1999, indicates that the claimant is not to return to work until the ESI series is completed). Nonetheless the claimant disputed Dr. L's report and Dr. K was appointed the designated doctor. In a Report of Medical Evaluation (TWCC-69) and narrative both dated December 23, 1999, Dr. K certifies MMI on November 4, 1999, with a 0% IR. Dr. K references "an MRI report dated 07/08/99 which shows L5-S1 spondylosis with mild disc bulge" and expresses agreement with Dr. L's November 4, 1999, report. The claimant contends that Dr. K did not have all the pertinent records and films and that Dr. L's report seemed to imply that the claimant had completed his work hardening and ESI procedures when in fact that was not the case.

Because of some conflict, the claimant changed treating doctors from Dr. T to Dr. M in February 2000. Dr. M disagreed with Dr. K's evaluation and in reports of February 3 and 10, 2000, stated that the claimant should proceed with the three ESI's and undergo rehabilitation. (There are some inconsistencies/contradictions in two of Dr. M's March/April 2000 reports.) After a benefit review conference, a benefit review officer (BRO), by letter dated April 6, 2000, seeks clarification from Dr. K but omits sending any of Dr. M's reports

or records. Dr. K replies by letter of April 13, 2000, stating there is no new information "presented to me, so my opinion must remain." On August 2, 2000, the claimant underwent lumbar discogram and postdiscogram CT scan testing which showed abnormalities at L4-5 and L5-S1, including right posterolateral annular tears with broad discal protrusious.

By letter dated "September 13, 1999 [sic 2000]" another BRO again writes Dr. K requesting clarification but includes reports from Dr. M and the August 2, 2000, diagnostic tests. Dr. K replied by correspondence dated September 25, 2000, sending an amended TWCC-69 indicating MMI had not been reached and in a narrative stated:

> After reviewing the forwarded additional medical records, including a Discogarm/CT dated 8/2/00, it is apparent that [claimant] has not reached MMI based on these diagnostic findings. The interpretation of the discogram states, "Abnormal disc morphology on discography with annular tears on CT at L5-S1." Obviously, this finding requires additional medical attention as deemed necessary by [Dr. M.]

The hearing officer gave presumptive weight to this report and adopted the opinion that the claimant had not reached MMI.

The carrier, both at the CCH and on appeal, stresses Dr. K's first report; argues that Dr. K was not sent the actual discogram film (only the report); and attacks Dr. M's credibility and motives. In evidence is a report of a surveillance tape (and testimony of the investigator) which the carrier contends was not given sufficient weight by the hearing officer. Basically, the carrier is asking us to substitute our judgment regarding the weight to give to the evidence for that of the hearing officer. In this regard we can only note that the hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)), resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)), and determines what facts have been established from the conflicting evidence. St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust and we do not find them so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge